No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The Solicitor General, on behalf of Frances Perkins, Secretary of Labor, and the other defendants in this action, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, which reversed the judgment of the District Court dismissing the complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 388–410) has not yet been reported.

JURISDICTION

The decision of the Court of Appeals for the District of Columbia was announced on August 4, 1939 (R. 387–388), and its judgment was entered on October 3, 1939 (R. 410). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondents are steel manufacturers which, dissatisfied with the determination under the Public Contracts Act of minimum wages to be paid by Government steel contractors, brought suit to enjoin enforcement of the determination. The questions are:[1]

1. Whether the respondents have standing to maintain this action.

2. Whether this suit is against the United States, which has not consented to be sued.

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[1] Other questions, which will be urged if the petition for a writ of certiorari is granted, are:

1. Whether a wage determination by the Secretary of Labor under the Public Contracts Act is subject to judicial review in this proceeding.

2. Whether the complaint states a cause of action for an injunction.

3. Whether the respondents have exhausted their administrative remedies.

4. Whether the complaint states a cause of action for a declaratory judgment.

5. Whether the Court of Appeals properly granted the injunction *pendente lite* in this cause and whether the terms of that injunction were correct.

3. Whether the wage determination is void because arbitrary, capricious, or erroneous in law.

STATUTE INVOLVED

The statute involved, known as the Public Contracts Act, approved June 30, 1936, c. 881, 49 Stat. 2036, is printed in the Appendix, *infra*, pp. 20–26.

STATEMENT

The allegations of fact in the complaint (R. 3–45) and in the exhibits annexed to the complaint (R. 45–259), and the applicable provisions of the Public Contracts Act may be summarized as follows:

The respondents are seven corporations engaged in the manufacture and sale of products of the iron and steel industry, and are classified in that industry "as either medium-sized or small companies" (R. 9). Five of these companies have their manufacturing plants in Pennsylvania, one in Connecticut, and one in Maryland (R. 3–9). They pay a minimum hourly wage to common laborers of less than 62½ cents and ranging from 52½ cents to 56½ cents (R. 3–9, 313). Some of these companies have in the past sold iron and steel products to various departments of the Government of the United States, and it is alleged that the respondents desire to bid on Government contracts (R. 4–9).

Section 1 of the Public Contracts Act (Appendix, *infra*, pp. 20–21) provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, there shall be included a stipulation that all persons employed by the con-

tractor in the performance of the contract will be paid not less than "the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *." Section 4 directs the Secretary of Labor to administer the Act and gives the Secretary or his authorized representative power to make investigations and findings and to make regulations to carry out the provisions of the Act.[2] Section 11 of the Act provides that the provisions requiring inclusion of representations with respect to minimum wages shall apply only to contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

On July 11, 1938, the Administrator of the Division of Public Contracts notified manufacturers of iron and steel products, including the respondents, that hearings would be held before the Public Contracts Board, created by the Secretary under the Act, to take testimony upon which recommendations would be made to assist the Secretary to determine the prevailing minimum wages. On July 25 and July 26 the Board held a hearing, at which the respondents were represented, and on November 19, 1938, the respondents received copies of the findings of fact, conclusions and recom-

[2] Other sections of the Act provide methods by which to determine if there has been, and penalties for, a breach of the stipulations (Secs. 1, 3, 5) and for exceptions, modifications and tolerances with respect to the stipulations (Sec. 6).

mendations of the Board dated October 27, 1938. The majority of two members of the Board recommended (R. 206–207) that the Secretary determine prevailing minimum wages of 45 cents an hour in twelve named southern states, and 62½ cents an hour in the remaining states. A minority of one member of the Board recommended the determination of prevailing minimum wages of 62½, 60, 56½, and 55 cents in four prescribed areas in the northern and western states (R. 207–218).

Respondents excepted to the recommendations made by the Board (R. 231-239) and, after a hearing before the Acting Secretary of Labor, the determination of January 16, 1939, was made. The determination differed from the recommendations of the Board by determining the prevailing minimum wages for six localities to be 45, 58½, 60 and 62½ cents an hour. One locality with a minimum wage of 62½ cents includes the places in which the respondents' plants are located (R. 239–254). The determination became effective on March 1, 1939 (R. 254).

Respondents on February 25, 1939 filed a complaint (R. 3–45) which prayed a temporary restraining order, a preliminary injunction and a final injunction against enforcement of the determination by the petitioners and prayed a declaratory judgment that the determination is invalid (R. 42–44). The petitioners are (a) the Secretary of Labor, the Assistant Secretary of Labor, and the Administrator of the Division of Public Contracts of the Department of Labor, charged with administration of the Act; and (b) the Secretary of the Treasury, the Director of the Procurement Divi-

sion of the Treasury, and the Secretaries of War, the Navy, the Interior, and the Postmaster General, who are alleged to control the award of Government contracts by their departments.

The complaint alleges, among other things, that the determination is invalid because of errors of law and because it is arbitrary and capricious in its construction of the word "locality" (R. 26–28); in its disregard of facts in the record and in the report of the Board (R. 27–30); and in making its determination without supporting evidence (R. 30–31).

The complaint alleges that invitations to bid on five contracts for the Navy Department which were about to be opened required the stipulation to pay the minimum wages fixed by the determination and that some of the respondents desired to bid on the contracts; that the petitioners, the Secretaries of the Treasury, Navy, War, Interior, and the Postmaster General intend to and, unless enjoined, will require the insertion of the stipulation in every contract awarded after March 1, 1939; and that large contracts are expected to be awarded (R. 33–36).

The complaint further alleges that, unless injunctive relief is granted, the respondents will suffer immediate and irreparable injury in that (1) they will be deprived of the right to bid on Government contracts without the wage stipulation; (2) that if they include the stipulation they might be estopped from claiming the invalidity of the determination or might be subject to the penalties under the Act; (3) that to obtain Government contracts they will be required as a practical matter to raise wage levels even for non-Government business;

(4) that they may be unable to compete with larger steel companies paying the minimum wage; and (5) that there is no adequate remedy at law.

On February 28, 1939, a limited temporary restraining order (R. 281–285) was entered. On March 6, 1939, the petitioners filed a motion to dismiss the complaint (R. 288–289), on the grounds, among others that: (a) the complaint failed to state a claim upon which relief could be granted or the action maintained; (b) the court lacked jurisdiction of the subject matter of the action; and (c) the facts alleged in the complaint showed that it was a suit against the United States. The temporary restraining order was dissolved, and the motion to dismiss of the petitioners was granted on March 14, 1939.

On March 17, 1939, the respondents filed, in the Court of Appeals, an original petition for an injunction, pending final hearing and determination of the cause on appeal (R. 337–355). After argument on March 22, 1939, the Court of Appeals, on March 27, 1939, granted an injunction, pending further order of that court, which enjoined all of the petitioners from continuing to enforce the determination (R. 372). On March 29, 1939, the petitioners filed a motion for reargument on the petition for an injunction pending appeal or, in the alternative, for argument to clarify the terms of the injunction and to determine the security. The above motion and the appeal from the order of the District Court were argued in the Court of Appeals on April 4, 1939 (R. 385–386). On April 13, 1939, the petitioners filed a motion to dissolve the temporary injunction

theretofore granted by the Court of Appeals (R. 386–387).

On August 4, 1939, in a *per curiam* opinion (Justice Edgerton dissenting) the Court of Appeals announced the reversal of the judgment of the District Court pursuant to opinions to be filed subsequently, and continued the temporary injunction in effect (R. 387–388). On October 3, 1939, the majority and minority opinions of the Court of Appeals were filed, the judgment of the District Court was reversed and the case was remanded with instructions to proceed in accordance with the opinion (R. 388–410). The Court of Appeals has never acted upon petitioners' motion of March 29, 1939 for clarification of the injunction *pendente lite* and for security.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred—

(1) In holding that the respondents have a legal right sufficient to maintain this action.

(2) In holding that the Acting Secretary of Labor's wage determination is subject to judicial review in this proceeding.

(3) In holding that this suit is not a suit against the United States.

(4) In holding that the complaint states a cause of action in equity for relief by injunction.

(5) In holding that the complaint states a cause of action for a declaratory judgment.

(6) In failing to hold that the complaint should be dismissed because the respondents have not exhausted their administrative remedies.

(7) In holding that the wage determination was not a valid exercise of discretion by the Secretary of Labor.

(8) In holding that the wage determination was arbitrary, capricious, and without warrant or authority of law.

(9) In granting respondents' motion for an injunction *pendente lite*, and in refusing to dissolve or clarify or to require security for such injunction.

REASONS FOR GRANTING THE WRIT

This case is of great importance with respect to the contracting and purchasing functions of the Government. It presents important questions as to (a) the extent to which a person, asserting merely a desire to bid for Government contracts, may obstruct or delay the Government's contracting and purchasing activities, and (b) the proper construction and administration of the Public Contracts Act, which in large part would be emasculated if the decision of the court below were finally to prevail.

I

The respondents have no legally protected right which will be injured by the inclusion in Government contracts of a stipulation requiring the payment of the minimum wages as determined by the Acting Secretary of Labor to be the prevailing minimum wages in the locality in which respondents' plants are situated. They have, therefore, no standing to complain of the determination or of the requirement on the part of contracting officers that contractors with the Government must pay the minimum wages required by the determination.

The respondents are mere prospective bidders on Government contracts. Neither the prevailing minimum wage determination nor the inclusion of the minimum wage stipulation in Government steel purchase contracts limits or controls the respondents in the conduct of their general iron and steel business. The requirements relate only to the terms of the contracts which the respondents and others may make with a particular customer—the United States. Only if the respondents wish to enter into contracts with the United States will they be required to pay the minimum wages called for by the determination, and they will be required to pay those wages only to such of their employees as are employed in the manufacture or furnishing of the materials used in the performance of the contract.

The settled distinction between the limits on the regulatory powers of government and those with respect to the conditions it may impose upon its vendors is pointed by a comparison of *Truax* v. *Raich*, 239 U. S. 33, with *Heim* v. *McCall*, 239 U. S. 175, decided four weeks later. In the *Truax* case the Court held unconstitutional, as a denial of equal protection of the laws, an Arizona statute which required that any employer of more than five workers should employ not less than 80% qualified electors or native born citizens of the United States. In *Heim* v. *McCall*, on the other hand, the Court sustained a New York statute which required that in the construction of public works by the state or a municipality, or by persons contracting with the state or a municipality, only citizens of the United

States should be employed. Compare, similarly, *Lochner* v. *New York*, 198 U. S. 45, with *Ellis* v. *United States*, 206 U. S. 246. That no person has a legal right to do business with the Government except upon such terms and conditions as the Government may prescribe would seem no longer open to argument.[3]

Revised Statutes, Sec. 3709, relied upon by respondents, has been construed to require Government officers to accept the bids of the lowest responsible bidders upon Government contracts. But it is settled that this statute is "for the protection of the United States, not of the seller", and confers no legal right upon bidders seeking Government contracts or even those conceded to be the lowest responsible bidders. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78.[4]

In short, respondents complain only that the Government will not buy their steel unless they pay the stipulated wages. The contract provisions become operative only if respondents choose to bid and only if the contract is awarded to them. Any injury is both speculative and of their own choice. The courts afford no redress against governmental action which merely increases or sharpens competition. *Alabama Power*

[3] *Ellis* v. *United States*, *supra*; *Heim* v. *McCall*, *supra*; *Atkin* v. *Kansas*, 191 U. S. 207; *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A. 8th); *United States Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A. 6th); *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. C. Mass. 1934); *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628 (1927).

[4] See also *United States* v. *New York & Porto Rico Steamship Co.*, 239 U. S. 88, 92–93; *Colorado Paving Co.* v. *Murphy*, *supra*; *O'Brien* v. *Carney*, *supra*; *United States Wood Preserving Co.* v. *Sundmaker*, *supra*.

Co. v. *Ickes,* 302 U. S. 464; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118. *A fortiori,* they afford no redress for the added cost of doing business with the Government upon its terms.

The very nature of the Secretary's determination adds weight to the barriers preventing attack in the courts. It is not an order; it commands none to do any act; it subjects none to any liability, civil or criminal; it withholds no license. It simply finds the prevailing minimum wages which must be paid by respondents if they are to sell to the Government. The determination, under settled principles of judicial review, may not be reexamined by the courts. *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 309–310; *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130–131.

II

The respondents' efforts by injunction to restrain and interfere with the contracting and purchasing activities of the Government must fail because the respondents' complaint is, in effect, a suit against the United States.

Whether a suit will be deemed in legal effect to be against the United States depends, of course, upon the effect of the decree sought, not upon the mere joinder or nonjoinder of the United States as a formal party to the action. *Louisiana* v. *McAdoo,* 234 U. S. 627, 629; *Goldberg* v. *Daniels,* 231 U. S. 218, 221–22. The contracts which the respondents hope to enter into are, clearly, contracts with the United States, not with any of the petitioners. In seeking to control the official

acts of the petitioners, the respondents are in fact seeking to interfere with the contracting and purchasing activities of the United States. A suit for an injunction which would enforce a contract of the United States is a suit against the United States. *Wells* v. *Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2d); *Johnstown Coal & Coke Co.* v. *Wilson*, 60 F. (2d) 557 (E. D. N. Y.). By the same token, a suit for an injunction which seeks to exclude certain designated terms and conditions from proposed Government contracts is a suit against the United States.

The instant case does not fall within the recognized category where relief by a suit against federal officials may be obtained. The action brought by the respondents is not to protect any legal right from threatened invasion. The wage determination of the Acting Secretary of Labor was made pursuant to the provisions of the Public Contracts Act, and solely in the Secretary's official capacity. The determination was clearly based upon the exercise of official discretion. Finally, the relief sought by the respondents cannot be granted without judicial interference with the procedures and functions of the Federal Government.

It is as necessary for the Government to buy and to contract as it is for the Government to tax. The ordinary functions of the Government, to say nothing of the needs for national defense, cannot be carried on without buildings, furnishings, and supplies. The purchasing and contracting activities of the Government are in no sense regulatory in character and do not

subject individuals or private interests to any restraint. It would be an entirely novel principle, and a serious threat to the efficient and flexible functioning of the Government, if the courts should undertake to interfere with or control the Government's purchasing activities. If a single disgruntled merchant, dissatisfied with regulations governing eligibility to bid or to obtain an award, may, by invoking the aid of the courts, tie up or hamper the purchasing activities of the Government, the consequences are likely to be far-reaching and serious.

III

The court below held that the Acting Secretary of Labor committed a plain error of law in his construction of the term "locality" as used in the Public Contracts Act. The respondents have urged that the term "locality" means "the city, county, village or other civil subdivision of a State in which work under a particular Government contract is to be performed, or the immediate vicinity of that place, or, at most, a small geographical area" (R. 26). The majority of the court below appears in general to have agreed with these contentions, and for that reason held the determination invalid.

1. To apply to the Public Contracts Act the construction of "locality" adopted by the court below, would defeat the purposes of the Act and make it extremely difficult of administration. Many products or commodities which the Government customarily purchases are furnished or manufactured at hundreds of differ-

ent points throughout the country. If the prevailing minimum wage must be ascertained for each narrowly-restricted geographical area of which a point of production is the focus, in advance of inviting bids, an enormous amount of preliminary work on the part of the Department of Labor will have to be performed. The bulk of this work would be useless, since there would be no way to tell in advance from what cities, towns, or counties bids might be submitted. The construction of the word "locality" adopted by the Acting Secretary— i. e., a construction under which the word means an area of small or large extent according to the economic facts of the particular industry, seems plainly to be the only sensible construction from an administrative standpoint.

Furthermore, the construction adopted below would wholly defeat the obvious policy of the Public Contracts Act. Its plain purpose is to ensure that Government contractors pay not less than prevailing minimum wages, and to eliminate sub-standard wages as a competitive element in bidding. The word "locality" was, no doubt, inserted in order to authorize and direct the Secretary of Labor to take account of geographic differentials in wage scales. But if the word "locality" should be construed as necessarily meaning a very small area such as a town or a city, the Act would be robbed of its intended effect. In the iron and steel industry, for instance, there are numerous towns, cities, villages, or counties in various parts of the country where there is but one steel plant. These plants, of course, compete with others in different cities and

towns. Under the construction adopted by the court below, the prevailing minimum wage at each such plant would be the wage actually being paid, and the determinations by the Secretary would merely confirm existing wage scales at each plant. Such a construction reduces the Act to a futile gesture.

2. In 1931 the Davis-Bacon Act (c. 411, 46 Stat. 1494) was enacted, to fix minimum wages in the case of construction contracts for Government buildings. That Act, as amended in 1935 (c. 825, 49 Stat. 1011), provided that the minimum wages on such construction projects should be based upon the prevailing wages "in the city, town, village, or other civil subdivision of the State in which the work is to be performed". The language of the Davis-Bacon Act was appropriate for the problem of regulating minimum wages in connection with construction contracts, which necessarily can be performed at only one place. But it would have been entirely inappropriate for use in the Public Contracts Act, which deals not with work on construction projects, but with work in the manufacture or furnishing of Government supplies. Here the field is broad and suppliers who normally compete for Government contracts are widely separated. Congress in the Public Contracts Act accordingly did not use the language of the Davis-Bacon Act, but substituted for the phrase "city, town, village, or other civil subdivision of the State in which the work is to be performed" the more flexible work "locality."

3. The construction of the Public Contracts Act by the court below is in contradiction of the adminis-

trative construction.[5] This contemporaneous administrative construction, which accords with the purposes and requirements of the Act and is certainly not plainly erroneous, should be given great weight by the courts. *Norwegian Nitrogen Co.*, v. *United States*, 288 U. S. 294, 315; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330.

4. Judicial decisions construing the word "locality" lend full support to the administrative construction. It goes without saying that, in appropriate context and circumstances, the word "locality" can be and is used to designate a small "local" area. But it is well settled that the word "locality" has a relative meaning, and that the context determines its meaning in each case. *Connally* v. *General Construction Co.*, 269 U. S. 385, 394.[6]

The Public Contracts Act is not the first statute in which Congress has employed the word "locality" as a flexible term of broad meaning. Section 3, paragraph (1) of the Interstate Commerce Act (49 U. S. C. Supp.

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[5] The administrative construction has been wholly consistent in result, although divergent theories have been applied. In some cases the requirement of "locality" has been read as not modifying "persons employed on similar work." See e. g., *In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*, 2 Fed. Register, Part 1, p. 233. In other cases, as here, the term "locality" has been given a reasonably broad interpretation.

[6] Compare the varying content given the term "locality" in *Ruark* v. *International Union of Operating Engineers*, 157 Md. 576, 146 Atl. 797 (1929); *Murphy* v. *Worcester Consolidated Street Ry. Co.* 199 Mass. 279, 85 N. E. 507; *State* v. *Fremont, E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118 (1887); *Foster* v. *Hart*

IV, Sec. 3 (1)), makes unlawful "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality * * *." See also Section 13, paragraph (4) of that Act (49 U. S. C. Supp. IV, Sec. 13). In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, the Court stated (p. 638) that:

> The word "localities," therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers.

There is, under the Public Contracts Act, at least an equal necessity that the term "locality" be read in light of the Congressional purpose and the economic practices of the industry.

The word is also used in Section 1 of the Cattle Contagious Diseases Act of Feb. 2, 1903 (c. 349, 32 Stat. 791; 21 U. S. C. Sec. 121), and in Section 7 of the Plant Quarantine Act of Aug. 20 1912 (c. 308, 37 Stat. 317; 7 U. S. C. Sec. 160). In both instances it is clear from the subject matter and purposes of the statutes that the word "locality" was not intended to have a narrow or restricted meaning, such as was adopted in the present case by the court below.[1]

Consolidated Mining Co., 52 Col. 429, 122 Pac. 54 (1912); *Severance* v. *Murphy*, 67 S. Car. 409, 46 S. E. 35 (1902); *Pierce* v. *Dillingham*, 96 Ill. App. 300 (1901).

[1] In administering the Plant Quarantine Act (which authorizes the Secretary of Agriculture to forbid the importation of plants from a "country" or "locality" where a plant disease exists) the Secretary of Agriculture has prohibited the importation of designated products from the provinces of Canada east of the eastern boundary of Manitoba (Quarantine No. 41, April 23, 1926).

5. The court below did not find error in the determination apart from the Secretary's construction of "locality." We shall not, therefore, undertake now to show that the determination was supported by the findings of fact. So far as respondents attempt to attack the findings as unsupported by the evidence, or the determination as arbitrary or capricious in the light of the evidence, it is clear that this Court is not now called upon to determine these questions, since the record does not include the evidence before the Secretary.

CONCLUSION

It is respectfully submitted that, for the reasons stated,[8] this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER, 1939.

Those provinces do not constitute a "country," and therefore presumably were designated as a "locality." Certainly that order, in the light of the purposes of the Plant Quarantine Act, could not be held invalid merely because the Act spoke of "locality"; no more can the determination in the present case under the Public Contracts Act be held unwarranted for that reason.

[8] In the event that the petition for a writ of certiorari is granted, we shall also urge: (a) that the respondents' complaint fails to state a cause of action in equity for an injunction, because the allegations of irreparable damage are insufficient and because the allegations of immediate enforcement of the determination by petitioners are insufficient; (b) that the complaint fails to allege that the respondents have exhausted their administrative remedies; (c) that the complaint does not state a cause of action for a declaratory judgment; and (d) that the court below erroneously granted an injunction *pendente lite* and, in any event, that the terms of such injunction and the failure to require security therefor were erroneous.

APPENDIX

Act of June 30, 1936, known as the Public Contract Act, c. 881, 49 Stat. 2036; 41 U. S. C. Supp IV, secs 35–45:

AN ACT To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries cur-

rently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer

knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have

elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, fail-

ure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secre-

tary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training, and schooling in trades and

occupations, and for other purposes," approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

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